United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7234-7235-7236

United States Court of Appeals
For the Second Circuit

Docket No. 75-7234

SAMUEL J. LEFRAK, *et al.*,
Plaintiffs-Appellees,

—against—

ARABIAN AMERICAN OIL COMPANY, *et al.*,
Defendants-Appellants.

Docket No. 75-7235

ROCHDALE VILLAGE, INC.,
Plaintiff-Appellee,

—against—

ARABIAN AMERICAN OIL COMPANY, *et al.*,
Defendants-Appellants.

Docket No. 75-7236

NEW YORK CITY HOUSING AUTHORITY,
Plaintiff-Appellee,

—against—

ARABIAN AMERICAN OIL COMPANY, *et al.*,
Defendants-Appellants.

BRIEF OF DEFENDANTS-APPELLANTS

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June 9, 1975

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Preliminary Statement

This appeal is taken by defendants Exxon Corporation, Gulf Oil Corporation, Texaco Inc. and Arabian American Oil Company from an order of District Judge Mark A.

Costantino filed on March 11, 1975 denying their motion to disqualify certain attorneys representing the plaintiffs in three private antitrust actions now pending in the Eastern District of New York and to enjoin these attorneys and those acting in concert with them from soliciting clients and stirring up litigation against defendants.

The order below denying disqualification is a final order appealable under 28 U.S.C. § 1291, and accordingly the appeal is properly before this Court. *Ceramco, Inc.* v. *Lee Pharmaceuticals, Inc.*, Nos. 74-1757, 74-1858 (2d Cir. January 30, 1975); *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974) (*en banc*).

Parallel antitrust claims are asserted in each of the three actions, the plaintiffs each claiming to have purchased heating oil from local distributors or others, at prices allegedly fixed by defendants, for use in apartment houses in metropolitan New York.

The first in this series of antitrust actions brought by plaintiffs' attorneys was commenced on July 2, 1974, entitled *Lefrak Organization, Inc.* v. *Arabian American Oil Co., et al.*, 74-C-979 (the "Lefrak Organization case"). It was brought by David Berger, P.A. ("the Berger firm"), a firm of attorneys in Philadelphia. Local counsel in the action was Richard Lefrak, Esq. That action was dismissed by the District Court on January 10, 1975 after it appeared in the course of the proceedings that plaintiff Lefrak Organization, Inc., had no stake in the action since it had never purchased, received or paid for any heating oil (Rec. No. 79 in 74-C-979).

Faced with defendants' motion to dismiss the complaint in the action brought in the name of Lefrak Organization, Inc., the Berger firm filed a new action on behalf of 116

Lefrak "entities"[1] on December 3, 1974 entitled *Samuel J. Lefrak, et al.* v. *Arabian American Oil Co., et al.*, 74-C-1700. On December 24, 1974 the Berger firm followed by filing *New York City Housing Authority* v. *Arabian American Oil Co., et al.*, 75-C-15 and it filed another action on January 29, 1975 entitled *Rochdale Village, Inc.* v. *Arabian American Oil Co., et al.*, 75-C-135.[2] None is a class action and all are assigned to District Judge Mark A. Costantino.

In February 1975 the defendants came upon documents which strongly suggested that improper efforts were underway to encourage scores of additional plaintiffs to hire the Berger firm to file identical claims against the defendants in the present actions, in violation of New York Judiciary Law § 479 and Disciplinary Rules DR 2-103(C), (D) and (E) and 2-104(A)(1) of the Code of Professional Responsibility. When these documents were brought to the attention of the District Court, all requests for discovery on the subject were refused and while a hearing was held on defendants' motion to disqualify, there was no meaningful examination of the underlying facts. The District Court denied defendants' motion in all respects.

Question Presented

Did the District Court abuse its discretion when, confronted with prima facie evidence of a campaign to solicit clients, it refused to permit discovery of the princi-

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[1] Plaintiffs are proprietorships, partnerships, corporations and trusts in which Samuel J. Lefrak is alleged to have an interest.

[2] A fifth action asserting parallel antitrust claims and brought by the same attorneys in the same court was commenced by 48 plaintiffs on March 31, 1975, subsequent to the order appealed from, entitled *Harry B. Helmsley, et al.*, v. *Arabian American Oil Co., et al.*, 75-C-467.

pal actors, prevented meaningful examination of facts necessary for a proper determination of the motion for disqualification and denied in all respects defendants' requests for relief?

Relief Requested

Defendants request that the order denying disqualification be vacated and the proceedings be remanded with instructions for a full and vigorous investigation of the underlying facts.

Proceedings Below

A. Discovery Of The Letter Writing Campaign

On January 10, 1975 just prior to the dismissal of the *Lefrak Organization* case, counsel from the Berger firm announced in open court:

> We are going to have a substantial number of additional plaintiffs, some of whom fall into the same commercial relationship as Lefrak, others who may be cooperatives and the like. (60a)

Defendants subsequently discovered during February 1975 that potential plaintiffs were being approached on a wholesale basis with the suggestion that they retain the Berger firm to represent them in the suit brought by "the Lefrak Organization." Purely by happenstance an attorney for one of the defendants is a member of the Board of Directors of a cooperative apartment building in Manhattan which employs Sulzberger-Rolfe, Inc. as managing

agent. In that capacity he received a copy of this circular letter (113a):

February 6, 1975

Dear Board President:

As you may have heard, a lawsuit has been brought by the Lefrak Organization against the major oil companies.

The suit is being prosecuted in the U.S. District Court for the Eastern District of New York by David Berger, Esq. and seeks treble damages under the Federal Anti-trust Act and damages for violation of the New York State's Anti-trust Law for claimed overcharges for fuel oil and electric fuel adjustment billings. The case is not a class action and only those who join the Lefrak Organization as plaintiffs will be entitled to share in the recovery. Mr. Berger is a highly qualified Philadelphia trial attorney who heads a firm which limits its practice to anti-trust and securities litigation.

The firm of Wien, Lane & Malkin has been retained as associated counsel with Mr. Berger on behalf of various residential property owners. The action is being limited to residential property claims.

Counsel fees will be on a contingent basis of one-third of any amount recovered by settlement or trial of the lawsuit. Any counsel fees awarded by the court will be deducted from the one-third contingency fee. Intervening parties are being asked to advance to Mr. Berger's firm the sum of $1.00 per apartment to be applied toward out-of-pocket expenses. Any unused portion of the advances will be returned to the parties proportionately.

The Complaint asks for millions of dollars in compensatory and punitive damages as well as injunctive relief against any further illegal conduct by the oil companies. The basic product involved in the lawsuit is heating oil used in residential buildings.

Many Boards of Directors of co-operative buildings in New York have already agreed to contribute $1.00 per unit in their buildings in return for receiving a proportion of the award which may be granted by the Court.

I am enclosing an agreement drawn by Mr. Berger. I suggest that this agreement be presented as soon as possible to your Board of Directors for possible approval. If your Board approves, please return a signed copy of the agreement to me and I will take the necessary steps to have your building represented.

If you have any questions, I suggest you call William Lippman at Wien, Lane & Malkin (687-8700).

Sincerely,

SULZBERGER-ROLFE INC.
/s/ Norman Buchbinder

The "agreement drawn by Mr. Berger" (114a-115a) which accompanied the circular letter, in duplicate, read as follows:

DAVID BERGER, P.A., ATTORNEYS AT LAW

1622 LOCUST STREET

PHILADELPHIA, PENNSYLVANIA 19103

(215) 732-6000

DAVID BERGER
H. LADDIE MONTAGUE, JR.
WARREN D. HULLOY
LEONARD BARRACK
STANLEY R. WOLFE
GERALD J. RODOS
JOEL C. MEREDITH
DANIEL E. BACINE
MICHAEL K. SIMON
BRUCE K. COHEN
PAUL J. McMAHON
WARREN RUBIN
EDWARD H. RUDENSTONE
MERRILL G. DAVIDOFF
STEVEN J. GREENFOGEL

COUNSEL
ALEXANDER H. FREY
HAROLD BERGER

TELEX 834-309

Re: Lefrak Organization, Inc. v.
Arabian-American Oil Company, et al.
74 Civ. 979

Pursuant to your request we agree to represent you as an intervenor plaintiff in the above litigation instituted on behalf of Lefrak Organization, Inc. against major oil defendants seeking, inter alia, treble and punitive damages for federal and state antitrust violations resulting from substantial overcharges for certain petroleum products and electric fuel adjustment billings.

We agree to render all legal services necessary for the representation of your claim for damages in the above litigation for which we and associate counsel, if any, shall be entitled to a contingent fee of 33-1/3% of the amount received by you from defendants in damages, either by way of settlement or verdict or otherwise (after deduction for out-of-pocket expenses for which we will be reimbursed as set forth below). In the event the Court awards a counsel fee to be paid by defendants as a separate item over and above any recovery for damages sustained by you, such counsel fee shall be retained by us.

In order initially to defray the expenses of the litigation, you agree to contribute a sum equal to $1 for each unit in your buildings involved in your claims (each apartment or rental unit being regarded as a unit for this purpose). These expenses of litigation will include but will not be limited to such items as filing fees, costs

of transcripts, duplication costs, long distance telephone calls, travel expenses, costs of depositions, computer services, expert services of economists, investigators, etc. We will keep you fully advised of these expenses from time to time as they are being incurred.

You will fully cooperate with us and furnish our lawyers and others working on this case with all necessary and appropriate information so that we may vigorously and properly represent your interests in this litigation.

Please be good enough to sign the copy of this letter for our files.

With all best wishes, I am,

Sincerely,

David Berger

DB/pw

Approved and Accepted:

_____ _____

Date

Having discovered the first evidence of this apparent solicitation campaign, counsel for defendants attempted informally to determine whether similar communications had been sent by others. As a result counsel discovered that during February 1975 Douglas L. Elliman & Co., Inc. ("Elliman & Co."), another prominent real estate managing agent, had sent to between 75 and 100 (117a) cooperatives a circular letter (120a-121a) which was strikingly similar to the Sulzberger-Rolfe letter. It used identical language, but concluded with these additional paragraphs:

> It is believed that the oil companies will probably prefer to settle the case eventually rather than litigate the issues.
>
> We are bringing this matter to your attention so that you may decide whether, or not, you wish to join in this action. In the event you do make such a decision, we will be pleased to furnish, to the attorneys, all related information as to consumption, prices and billing on your behalf so as to establish your claim.
>
> The Administrator of your building will be in contact with you to determine your decision.

Although no in-blank retainer agreement accompanied the Elliman & Co. circular, the closing paragraphs anticipated that there would be follow-up with each board by the building administrator and that Elliman & Co. would provide "to the attorneys" whatever information was required to establish the claim of any cooperative.

As soon as possible this information was placed before the District Court in the form of an application by defendant Exxon Corporation for an order to show cause why plaintiffs' counsel should not be disqualified from representing plaintiffs in these actions and why plaintiffs'

counsel and others should not be enjoined from continuing the solicitation of legal representation (103a-105a). In aid of making a full presentation of the matter on the return date, defendant asked leave of the Court to take depositions of an officer of Sulzberger-Rolfe, an officer of Elliman & Co., Mr. William Lippman of the Wien firm and Mr. Berger (109a).

On the afternoon of February 21, 1975 the Court entered an interim order (105a) prohibiting plaintiffs' counsel from initiating communications with potential plaintiffs and fixed March 3 for the return date of the motion.[3] The Court denied the defendant's request for limited discovery.

Defendants Gulf, Texaco and Arabian American Oil Company filed companion motions (139a, 142a, 152a).

In the period prior to the return date, since they were unable to engage in formal discovery, defendants continued their efforts on an informal basis to determine the scope of the solicitation. It was discovered that on January 13, 1975 Mr. Lippman of the Wien firm had written a letter, similar to the Sulzberger-Rolfe and Elliman & Co. circular letters, to Brown Harris Stevens, Inc., another large real estate management company (252a). In addition, subsidiary distribution of the Elliman & Co circular to Frank Karelsen, Sr., an attorney, was found. The letter sent to Mr. Karelsen was apparently edited by scissors to excise the last paragraph of the Elliman & Co. text but was otherwise identical to it (255a). Also uncovered was a letter from Frank Karelsen, III Esq. to H. Adams Ashforth, of the Albert B. Ashforth Inc. real estate firm, enclosing a copy of the letter received by Frank Karelsen, Sr. and commenting:

> We are recommending that the enclosed letter be circulated to all our cooperatives. It could

[3] The return date was set for March 3 because his office reported that Mr. Berger would be of the country until that time.

> amount to a sizable piece of change. You will be hearing more on this shortly. (254a)

These letters were submitted to the Court on the return date (249a-253a).

B. The Explanations Of The Berger And Wien Firms

On the return date, March 3, 1975, the Berger firm and the Wien firm served a joint memorandum and a series of seven affidavits in opposition to the motion to disqualify. These affidavits were executed by Stanley R. Wolfe, Esq. of the Berger firm; Edward Sulzberger, President of Sulzberger-Rolfe, Inc.; Norman Buchbinder of Sulzberger-Rolfe, Inc.; John F. Hamlin and Irwin Gumley of Elliman & Co.; William Jay Lippman, Esq., of the Wien firm; and David Berger, Esq.

The affidavit of Stanley Wolfe acknowledged that he had spoken on the telephone to Edward Sulzberger of Sulzberger-Rolfe on July 30, 1974 and that he had confirmed his conversation in a letter to Mr. Sulzberger dated July 31, 1974 with which he had sent "an in-blank fee agreement" (187a). It was stated that the telephone call was made at the request of Richard Lefrak.

The affidavit of Mr. Edward Sulzberger confirmed the call from Mr. Wolfe on July 30, 1974 and the receipt of Mr. Wolfe's letter of July 31, 1974 enclosing the "in-blank fee agreement." However, Mr. Sulzberger said that in January 1975 he once again "requested" information, this time from Mr. Lippman of the Wien firm, as to the lawsuit and "the retainer arrangement which might be made with Berger." In response to this request he received from Mr. Lippman a letter dated January 10, 1975 (179a-180a). Mr. Sulzberger further stated that he instructed Norman Buchbinder of Sulzberger-Rolfe to pre-

pare the February 6, 1975 circular letter and the enclosed "in-blank fee agreement" for mailing to the presidents of all the cooperative apartment houses for which Sulzberger-Rolfe acted as manager (175a).

An affidavit of Mr. Buchbinder confirmed that he communicated only with Mr. Sulzberger in preparing the letter and made it clear that the contents of the letter were based exclusively on the Lippman letter and the in-blank Berger fee and retainer agreement (171a).

The affidavit of John F. Hamlin of Elliman & Co. also linked the Elliman & Co. circular to Mr. Lippman. His affidavit disclosed that he had received from Mr. Lippman a letter dated January 22, 1975; that letter was identical to the letter Mr. Lippman had sent on January 10 to Mr. Sulzberger. Mr. Hamlin apparently related Mr. Lippman's January 22 letter to conversations in which Mr. Lippman had given him "information as to the status of the lawsuits" (160a). On receiving the letter from Mr. Lippman, Mr. Hamlin requested Irwin Gumley of Elliman & Co. to prepare a circular to the boards of directors of all the cooperative apartments for which Elliman & Co. acted as manager (161a).

Mr. Gumley acknowledged in his affidavit that he prepared the Elliman & Co. circular letter. He also stated that he had several conversations with Mr. Lippman after the circular letter was sent out (156a) but there is nothing in the record indicating what was discussed on those occasions.

Mr. Lippman explained in his own affidavit that while his firm was acting as "associate counsel" in the litigation, he personally "had only very general knowledge about the litigation" and "did not know Mr. Berger personally" at the time he prepared his form letter to the real estate

management companies regarding "the lawsuit brought by the Lefrak Organization against the major oil companies." Mr. Lippman acknowledged that he was aware of Mr. Sulzberger's intention to communicate with property owners regarding the litigation before the Sulzberger-Rolfe circular letter was sent, but disclaimed any knowledge of the contents of the Sulzberger-Rolfe circular letter until he received his copy by mail from Sulzberger-Rolfe (164a). Mr. Lippman stated "I did not authorize the use in the letter of my name, the name of my firm, or Mr. Berger's name, nor did I furnish any form of retainer agreement on Mr. Berger's letterhead or otherwise" (164a).

Mr. Lippman said he sent to Mr. Hamlin of Elliman & Co. the same form letter, this time dated January 22, 1975, that he had sent to Mr. Sulzberger (165a) and professed similar ignorance of the contents of the Elliman & Co. circular letter until he received a copy in the mail. Again, he disclaimed any grant of authority to Mr. Hamlin to use the information contained in his letter (165a).

No affidavit of Mr. Ralph W. Felsten was submitted although he signed the Memorandum in Opposition to the motion to disqualify on behalf of the Wien firm (210a) and although Mr. Felsten was identified as the one who had principal responsibility for this litigation in the Wien office (287a; 299a). This was particularly surprising since it was also Mr. Felsten who in a letter dated February 11, 1975 had sent a report on the Sulzberger-Rolfe circular letter to Mr. Berger, including a comment which suggested when the "results" might become known.

Mr. Felsten's letter to Mr. Berger (190a) read as follows:

February 11, 1975

David Berger, Esq.
David Berger, P.A.
1622 Locust Street
Philadelphia, Pennsylvania 19103

Re: *Heating Oil Antitrust Litigation*

Dear David:

Enclosed for your information, is a copy of self-explanatory letter dated February 6, 1975 as distributed by our client, Sulzberger-Rolfe Inc. The retainer letter form distributed is the one we used prior to our recent decision to suggest the alternative, separate lawsuit. I doubt this will make for any difficulty. We now are waiting for returns on this and at least two groups of other possible litigants. We should have these results by February 21.

Cordially,

/s/ Ralph W. Felsten

RWF:ma
Enclosure
cc: Stanley R. Wolfe, Esq.
William Jay Lippman, Esq.

Mr. Wolfe explained in his affidavit that he received a copy of Mr. Felsten's letter but took no action, instead "awaiting Mr. Berger's direction if he felt any was required" (187a-188a).

Mr. Berger's affidavit stated that he was absent when the Felsten letter of February 11 reached his office (182a)

but his affidavit was silent as to his knowledge of why the letter was written to him and as to any action taken by him after reading it. Furthermore, Mr. Berger failed in his affidavit to explain in any way the meaning of Mr. Felsten's report. Although Mr. Berger denied prior knowledge of the Sulzberger-Rolfe and Elliman & Co. circular letters, he did not speak to the question of his knowledge of Mr. Lippman's correspondence with the management companies, which the Sulzberger-Rolfe and Elliman & Co. circular letters closely tracked.

C. The Hearing Of March 3, 1975

At the return of the motion on March 3, 1975 counsel for Exxon recounted to the Court the facts known to that time, including the Berger firm's prediction of additional plaintiffs, the dissemination of the circular letters and the in-blank fee and retainer agreement and the Karelsen letter. Counsel noted the particiular significance of Mr. Felsten's February 11 progress report to Mr. Berger. Counsel also stressed the imperfect state of knowlege of the details and extent of the solicitation campaign and requested permission to engage in immediate discovery, limited to the actors and events involved. He specifically requested that, in addition to the attorneys involved, testimony be taken from Norman Buchbinder and Edward Sulzberger of Sulzberger-Rolfe, Irwin Gumley and John Hamlin of Elliman & Co., a representative of the Ashforth and the Brown, Harris firms and Frank Karelsen (225a-226a; 229a-230a).

Judge Costantino responded to counsel's recitation of the facts and request for discovery as follows:

> The Court: That may be suspicion, but I am so sick and tired of suspicions where there is no real evidence of fact—suspicions today are such a horrible thing. That's all it is is suspicion.

> Its about time that we see evidence and facts to support it, that they be brought out on facts and not suspicion.
>
> Mr. MacCrate: I am seeking that opportunity by discovery. That is precisely what I am seeking, and the only reason I ask that is that I can present you with probative evidence that will satisfy you.
>
> The Court: How long will your discovery take, two minutes, five minutes? (224a-225a)

Later the Court added:

> The Court: That should take about four and a half minutes, no more. There shouldn't be loads and loads—it shouldn't be an inquisition, it shouldn't be a searching expedition, as we used to say in the state court, but we don't use it in the federal court because it is a dirty word—I don't believe in searching expeditions. It should be a straightforward, direct question: Did you, by any chance, receive a client because of the circulars? And they must answer truthfully yes or no after you swear them. (230a)

See also (227a-228a).

Acknowledging that some testimony might be appropriate,[4] the Court decided to hold a hearing, but refused to require production of any documents (245a-248a), again

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[4] The Court said to counsel for plaintiffs:

> The Court: Speaking as deliberate as possible, without making a determination, it wasn't at all the best judgment to have this—whoever sent it out, I don't care whether it was Sulzberger, it still wasn't the best judgment in the world to have that type of letter go out with the fee schedule attached to it.
>
> It may not be wrong under the canon of ethics, it still is improper in the sense that you shouldn't do it. It has nothing to do with being violative of a section of law or not, or a section of a canon of ethics or not, but that can raise a jaundice or suspicion . . . . (233a)

refused depositions (241a-242a) and limited the prospective witnesses at the hearing to four attorneys—Mr. Lippman and Mr. Felsen of the Wien firm and Mr. Berger and Mr. Wolfe of the Berger firm (248a). March 5 was fixed as the date for the hearing and counsel for defendant Exxon was instructed to prepare the questions he wished to ask the witnesses (242a).

D. The Hearing Of Testimony On March 5, 1975

Based upon the Court's rulings on March 3, counsel for defendant Exxon prepared for an examination of the four lawyer-witnesses on March 5. However, at the outset of the March 5 hearing, over the objections of counsel for Exxon, the Court ruled that it alone would ask questions of the witnesses (260a-261a; 263a), and that counsel had "no right to question anyone in this type of a hearing" (263a). Counsel for Exxon urged that the purpose of his intended questions was "to disclose whether or not there is a concerted action to stir up litigation against my client" (264a). But the Court rejected counsel's request on the grounds that it would make "an adversary proceeding" of what is "strictly a judicial proceeding" (264a).

In light of the Court's ruling, counsel tendered to the Court the outline of the questions that he had intended to propound to each witness (266a-267a) and a related series of exhibits to which the questions were addressed (267a). The Court recessed in order to consider the proposed questions, during which time the witnesses and plaintiffs' counsel studied the questions (268a). When the hearing was resumed the Court rejected the suggested line of interrogation, stating:

> I have the questions in my mind that I am going to ask, and they are not going any further. It is a question of the answers that I get to the questions.

> If I get the answers, then I may have some more questions. If I get certain other answers, there will be no other questions.
>
> I just cannot see—and I place it on the record—what purpose it will serve to go through this entire questioning that Mr. MacCrate has delivered to me; it has nothing to do, No. 1, with the merits of the action, and No. 2, if there has been no solicitation, merely a gratuitous sending out of a fee schedule, that doesn't make it a solicitation, and that is what I want to find out.
>
> I don't think we must go through anything else—and that is for the record—and if the Court of Appeals disagrees with me, fine. (270a-271a)

The Court then proceeded briefly to question Mr. Lippman and completely avoided any inquiry into the drafting or the content of his form letters mailed January 10, 13 and 22 which had been adopted verbatim as the text of the Sulzberger-Rolfe and Elliman & Co. circulars. No question was asked as to the source of the recitals in the letter despite Mr. Lippman's acknowledged unfamiliarity with the litigation he described therein, nor was any inquiry made regarding the origin of the assertion of the probability of settlement by the defendants. The Court also declined to ask about Mr. Lippman's failure to take any action after learning of the circularization, despite his admitted receipt of the circulars in the mail and his conversations with a representative of Elliman & Co.

The Court's questioning similarly ignored the content of Mr. Lippman's communications with Mr. Karelsen, III despite Mr. Lippman's acknowledgement that there were such communications (281a) and Mr. Karelsen's assurance in his February 5 letter to his correspondent that "You will

be hearing more on this shortly." (254a). The Court expressly refused to question Mr. Lippman as to any conversation with Mr. Karelsen that preceded Mr. Karelsen's forwarding of the circular letter to the Ashforth firm (283a).

Nor was Mr. Lippman questioned as to any discussion of these matters with his partner Mr. Felsten, nor as to his knowledge of the source for Mr. Felsten's report to Mr. Berger on when the "results" of the Sulzberger-Rolfe and other solicitations were expected to be in hand.

The Court, without further exploring with Mr. Lippman what had occurred in the Wien office, rejected counsel's request that the written questions be propounded (274a-275a), and next interrogated Mr. Berger:

> Q. And you are one of the persons that has been complained of soliciting through some letters that have been sent out? A. Yes. sir.
>
> Q. Have you at any time from the institution of this proceeding up to this time authorized anyone to solicit potential plaintiffs for this proceeding? A. No, sir. (283a-284a)

Continuing, the Court limited its interrrogation to matters not in issue and simply established that Mr. Lippman and Mr. Berger had not been in direct communication. The fact that Mr. Felsten was Mr. Berger's principal contact in the Wien firm was ignored, as was Mr. Felsten's progress report of February 11 to Mr. Berger. After the Court concluded its initial questions, counsel for defendant Exxon renewed his request that Mr. Berger be questioned on matters set forth in the written questions (286a), but the Court, while eliciting confirmation from Mr. Berger that he had drafted the form of in-blank fee agreement sent out from his office in July 1974 (286a), avoided any questions that would have required Mr. Berger to explain the anticipated reports from Mr. Felsten on "at least two groups of other possible litigants" (190a).

Turning next to Mr. Wolfe, the Court asked briefly about the circumstances of Mr. Wolfe's call to Mr. Sulzberger in July 1974 and the mailing of an in-blank fee agreement. Mr. Wolfe sought to justify the use of the in-blank fee agreement as "the most accurate way of telling somebody what the general terms of representation were" (292a). When the Court asked him directly, "did you ever send any blank retainers out, with the exception of Sulzberger?" Mr. Wolfe in reply took issue with the Court's characterization of the Berger form agreement as being a "retainer", but then gave the equivocal answer that "[t]here was never anything sent out other than in the context of the same thing with Mr. Sulzberger" (294a). The question was dropped (294a). The Court also asked:

> Q. Did you receive any returns—by that, did anyone because of this letter you sent to Mr. Sulzberger retain your firm in this proceeding, as far as you know? A. To the best of my knowledge, no.
>
> Q. Has anyone indicated to you who has come to you subsequently—has anyone retained you since— A. Since July, yes. But I have no knowledge, nobody has ever said to me, "I learned of this from Mr. Sulzberger."
>
> Q. And no one has said that to you? A. No one has ever said that to me. (292a-293a)[5]

---

[5] On August 2, 1974 the Berger firm and Richard Lefrak served motions to intervene in the *Lefrak Organization* case, one on behalf of Carol Management Company and another on behalf of Woods Management Company. Later in the same month, on August 30, 1974, four additional motions to intervene in the *Lefrak Organization* case were served by these attorneys, on behalf of Glenwood Management Corp., Pickman Brokerage, Inc., Hillside Associates and Forest Hills South, Inc. (20a; 28a; 36a; 42a). The order dismissing the *Lefrak Organization* case deemed these various motions to intervene withdrawn (56a).

When counsel for defendants pressed the Court to inquire further as to whom in-blank forms had been sent, the Court chose to include in its question the characterization "promiscuously"—upon which Mr. Wolfe appears to have seized to permit a negative response (296a) and when Mr. Wolfe began to elaborate on his answer, his attorney interrupted, successfully suggesting that Mr. Wolfe limit his answer (296a). The Court accepted this intrusion and dropped the subject.

The critical issue of Mr. Wolfe's contacts with Mr. Lippman and Mr. Felsten was avoided, including Mr. Felsten's February 11 report to Mr. Berger of which Mr. Wolfe had received his separate copy (187a). Instead, the Court inquired as to whether Mr. Wolfe had received any direct response to the Sulzberger-Rolfe and Elliman & Co. circulars, despite the obvious intention of the circulars that responses in the first instance go to associate counsel in the Wien firm.

Declining to pursue the further questions proposed by counsel for defendant Exxon to be asked of Mr. Wolfe (296a), the Court then called Mr. Felsten.

In questioning Mr. Felsten, the Court skipped over the text of the circular letter of Sulzberger-Rolfe and Elliman & Co. which had come verbatim from his partner, Mr. Lippman, dismissing the matter with Mr. Felsten's assurance that he did not participate in the drafting of the letters and had only answered unspecified questions from Mr. Lippman (302a). The Court did elicit from Mr. Felsten that the text of the Berger fee and retainer agreement had been the subject of lengthy negotiation between Mr. Felsten and Mr. Berger (299a-300a). When the Court approached the background to Mr. Felsten's statement to Mr. Berger in his February 11 letter that "We should have

these results by February 21'' (190a), Mr. Felsten's lawyer objected that this went into conversations between Mr. Felsten and ''his co-associate counsel'' and the Court quickly observed that it had ''stayed away from that completely'' (301a). Thus, even the most basic questions raised by Mr. Felsten's letter to Mr. Berger were never asked. Mr. Felster was excused.

The Court announced that its questioning was concluded.

E. Defendants' Application For Alternative Relief

Faced with the incomplete record developed by the Court at the March 5 hearing and the Court's refusal to permit any discovery, in its post-hearing submission Exxon requested the Court—if it saw fit to deny the full relief asked for in the motion of February 21, 1975—at a minimum, to order the Berger and the Wien firms to take the action which they admittedly had failed to take: to seek correction of the Sulzberger-Rolfe and Elliman & Co. circular letters by informing all recipients that (i) the statements relating to the Berger firm and the Wien firm were unauthorized and (ii) those firms were not available to represent them (349a-350a).

Defendants contended that the actions set in motion, directly or indirectly, by the Berger firm and the Wien firm, and for which they had professional responsibility, were resulting in continuing improper solicitation. The circular letter using the Berger and Wien names were false, misleading and incomplete, and the firms themselves insisted that the letters were unauthorized. In such circumstances, it was and continues to be the duty of the Berger and Wien firms to avoid so much as even the appearance of improper conduct, to take effective corrective action and to forbear from accepting the fruits of the improper activity.

F. The Opinion Below

The Court took the matter under advisement on March 6 and on March 11 filed its opinion and order (357a-367a). The Court denied the defendants' motion in all respects and further denied the alternative relief requested.

The Court based its conclusions on the assertion that Mr. Lippman had sent his form letter in each case to a client of the Wien firm, the assertion that no members of the Berger and Wien firms discussed the circular letters with the Wien clients before they were sent, the assertion that the use of the firm names was not expressly authorized by either firm, the assertion that the use of the in-blank fee and retainer form was not authorized by either firm and the assertion that no members of the two firms actually saw copies of the letters until after the circulation began.

Having effectively foreclosed inquiry as to the circumstances in which the Ashforth firm was solicited, the Court observed that there was no evidence that either the Wien firm or Berger firm was directly responsible for contacting that firm. Although noting that the distribution by Sulzberger-Rolfe of the blank retainer forms was "regrettable", the Court absolved the Berger and Wien firms of responsibility because it concluded that neither firm knew or had reason to know of the distribution until it had begun. The Court noted the assertion that no "plaintiff" had "joined" the litigation as a consequence of the Sulzberger-Rolfe and Elliman & Co. circular letters.

Upon the limited record it had developed the Court concluded that there was no showing that the Berger or Wien firms improperly gave advice or influenced another in violation of Ethical Considerations E-C 2-3, E-C 2-4 or E-C 2-8 of the Code of Professional Responsibility; that there was no showing that a member of either firm had requested a person or organization to recommend employment of the firms in violation of Disciplinary Rule DR 2-103(C), had

given improper assistance in violation of Disciplinary Rule DR 2-103(D) or had given unsolicited advice in violation of Disciplinary Rule DR 2-104; and, finally, that there was no evidence of improper solicitation in violation of New York Judiciary Law § 479. The Court did state, but declined so to order, that:

> Plaintiffs' counsel should advise Sulzberger-Rolfe, Inc. that it is not to distribute copies of the law firm retainer form to any potential plaintiff. Naturally, only individuals or companies which ask plaintiffs' attorneys for information about the litigation may be provided with a retainer form. (366a)

ARGUMENT

The Court Did Not Permit Full Examination Of Facts On The Motion To Disqualify.

A. It Is The Duty Of The Courts To Supervise The Conduct Of Attorneys Appearing Before Them.

This Court has consistently adhered to the principle that the courts possess inherent power to supervise the conduct of attorneys appearing in cases before them. *Ceramco, Inc.* v. *Lee Pharmaceuticals, Inc.*, Nos. 74-1757, 74-1858 at 1546-47 (2d Cir. January 30, 1975); *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F.2d 800 (2d Cir. 1974) (*en banc*); *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 574 (2d Cir. 1973).[6]

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[6] *Accord, Handelman* v. *Weiss*, 368 F. Supp. 258, 263 (S.D.N.Y. 1973); *Rubin* v. *Katz*, 347 F. Supp. 322, 323 (E.D. Pa. 1972); *Empire Linotype School, Inc.* v. *United States*, 143 F. Supp. 627, 631 (S.D.N.Y. 1956). *See also Hull* v. *Celanese Corp.*, No. 74-2126 (2d Cir. March 26, 1975); *Laughlin* v. *Eicher*, 145 F.2d 700 (D.C. Cir. 1944) *cert. denied*, 325 U.S. 866 (1945); *Brown* v. *Miller*, 286 F. 994 (D.C. App. 1923); *Kelly* v. *Boettcher*, 82 F. 794 (8th Cir. 1897); *E. F. Hutton & Co., Inc.*, v. *Brown*, 305 F. Supp. 371 (S.D. Tex. 1969).

As this Court made clear in *Ceramco*, at 1546-47, "the courts have not only the supervisory power but also the duty and responsibility to disqualify counsel for unethical conduct prejudicial to his adversaries."[7]

Disqualification assists the court in preserving the integrity of the judicial process; it does not seek private relief, but vindication of the values essential to our adversary system of justice. Judge Weinfeld has observed that "what is involved is a matter of public interest involving the integrity of the Bar." *Estates Theatres, Inc.* v. *Columbia Pictures Industries, Inc.*, 345 F.Supp. 93, 98 (S.D.N.Y. 1972). *See Emle Industries, Inc.* v. *Patentex, Inc., supra,* at 631. There can be no compromise of these principles and even laches of private parties does not interfere with the Court's power to disqualify. *Emle Industries, Inc.* v. *Patentex, Inc., supra,* at 574; *United States* v. *Standard Oil Company (New Jersey),* 136 F. Supp. 345, 351 at n. 6 (S.D.N.Y. 1955).

The actions of a district court in discharging its supervisory obligations will be overturned only if there has been an abuse of discretion. *Hull* v. *Celanese Corp.*, No. 74-2126 (2d Cir. March 26, 1975); *Richardson* v. *Hamilton International Corp.*, 469 F.2d 1382 (3d Cir. 1972),*cert. denied,* 411 U.S. 986 (1973); *Greene* v. *Singer Co.*, 461 F.2d 242 (3d Cir. 1972); *Waters* v. *Western Co. of North America,* 436 F.2d 1072, 1073 (10th Cir. 1971).

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[7] *Accord, Estates Theatres, Inc.* v. *Columbia Pictures Indus., Inc.*, 345 F. Supp. 93 (S.D.N.Y. 1972); *Empire Linotype School, Inc.* v. *United States,* 143 F. Supp. 627, 631 (S.D.N.Y. 1956).

Disqualification may be ordered on the court's own motion or on the motion of a party. *Universal Athletic Sales Co.* v. *American Gym, Recreational & Athletic Equip. Corp.*, 357 F. Supp. 905 (W.D. Pa. 1973); *United States* v. *Katz,* 296 F. Supp. 1404 (S.D.N.Y. 1969); *Empire Linotype School, Inc.* v. *United States,* 143 F. Supp. 627, 631 (S.D.N.Y. 1956); *Porter* v. *Huber,* 68 F. Supp. 132 (W.D. Wash. 1946). *See also Island Pa-Vin Corp.* v. *Klinger,* 76 Misc. 2d 180 (Sup. Ct. 1973).

An important aspect of the courts' power and authority to supervise attorneys' conduct is the cooperation and assistance required of counsel in preserving the integrity of the process. "When the propriety of professional conduct is questioned, any member of the Bar who is aware of the facts which give rise to the issue is duty bound to present the matter to the proper forum. . . ." *Estates Theatres, Inc.* v. *Columbia Pictures Industries, Inc., supra,* at 98. In fact the Code of Professional Responsibility, DR 1-103, mandates such a response. It provides:

> A lawyer possessing unprivileged knowledge of a violation of DR 1-103 [prohibiting professional misconduct] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

B. The Facts Before The Court Below Established That The Motion To Disqualify For Solicitation Of Clients Was Well Founded.

The rules and principles governing the conduct of attorneys are explicit in their condemnation of solicitation of legal representation. New York Judiciary Law § 479 provides:

> It shall be unlawful for any person or his agent, employee or any person acting on his behalf, to solicit or procure through solicitation either directly or indirectly business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal services, or to make it a business to so solicit or procure such business, retainers or agreements.[8]

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[8] New York Judiciary Law § 479. *See also* predecessor statute, New York Penal Law § 270-a (repealed effective September 1, 1967); New York Appellate Division Rules, First Judicial Department § 603.8; New York Appellate Division Rules, Second Judicial Department § 691.8; New York Appellate Division Rules, Fourth Judicial Department § 1022.1.

Under this statute and the principles embodied in it, systematic referrals are improper. *Matter of Marino*, 20 N.Y.2d 176 (1967); *People* v. *Beldegreen*, 298 N.Y. 601 (1948).[9]

Likewise improper is a prior arrangement between an attorney and a layman by which the layman recommends clients to the attorney. *Matter of Weber*, 26 App. Div. 2d 565 (2d Dep't 1966).[10] And where the number of referrals is large, the "inference is inescapable" that the clients were obtained by the attorney through pre-arrangement. *Matter of Shufer*, 12 App. Div. 2d 208, 212 (1st Dep't), *mot. for leave to appeal denied*, 9 N.Y. 2d 611 (1961).[11]

Aside from the state law, the Code of Professional Responsibility ("the Code") obliges attorneys to refrain from soliciting clients or advising persons to sue and then accepting their retainers.[12] The Code declares ex-

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[9] *See, e.g., Matter of Weber*, 26 App. Div. 2d 565 (2d Dep't 1966); *Matter of Fata*, 22 App. Div. 2d 116 (1st Dep't 1964), *aff'd*, 15 N.Y.2d 487, *cert. denied*. 382 U.S. 917 (1965); *Matter of Feldman*, 17 App. Div. 2d Div. 553 (1st Dep't 1969); *Matter of Shufer*, 12 App. Div. 2d 208 (1st Dep't), *mot. for leave to appeal denied*, 9 N.Y.2d 611 (1961); *People* v. *Meola*, 193 App. Div. 487 (2d Dep't 1920). *See also Matter of Connelly*, 18 App. Div. 2d 466 (1st Dep't 1963); *Matter of Duffy*, 19 App. Div. 2d 177 (2d Dep't 1963).

[10] *See, e.g., Matter of Shufer*, 12 App. Div. 2d 208 (1st Dep't), *mot. for leave to appeal denied*, 9 N.Y.2d 611 (1961); *Matter of Ariola*, 252 App. Div. 61 (1st Dep't 1937); *In re Kriendler*, 228 App. Div. 492 (1st Dep't 1930); *Matter of Schacht*, 228 App. Div. 232 (1st Dep't 1930).

[11] *See, e.g., Matter of Marino*, 20 N.Y. 2d 176 (1967); *Matter of Breiterman*, 22 App. Div. 2d 553 (1st Dep't 1965); *Matter of Kreisel*, 21 App. Div. 2d 431 (1st Dep't 1964); *Matter of Mahan*, 228 App. Div. 241 (1st Dep't 1930). *See Matter of Kelly*, 23 N.Y.2d 368, 380 (1968).

[12] In General Rule 5(f) of the Eastern and Southern Districts of New York, the Code is expressly made applicable to the conduct of counsel. Moreover, "while the Code does not have the force and

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plicitly that an attorney should not participate directly or indirectly in the encouragement of litigation or of his own employment.

Canon 2 states the broad principle that "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available." In this connection, the Ethical Considerations of the Code set forth a body of principles to guide lawyers in specific situations relating to assisting laymen and the matter of selection of lawyers by prospective clients.[13] From these broad principles the

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effect of a statute, it is recognized by bench and bar as setting forth proper standards of professional conduct." *Estates Theatres, Inc.* v. *Columbia Pictures, Indus., Inc.*, 345 F. Supp. 93, 95 at n. 1. (S.D.N.Y. 1972). *See, e.g., Hull* v. *Celanese Corp.*, No. 74-2126 (2d Cir. March 26, 1975); *General Motors Corp.* v. *City of New York*, 501 F.2d 639 (2d Cir. 1974); *Emle Indus., Inc.* v. *Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973); *Handelman* v. *Weiss*, 368 F. Supp. 258 (S.D.N.Y. 1973); *Empire Linotype School* v. *United States*, 143 F. Supp. 627 (S.D.N.Y. 1956); *Herman* v. *Acheson*, 108 F. Supp. 723 (D.D.C. 1952), *aff'd*, 205 F.2d 715 (D.C. Cir. 1953). *See also Erie County Water Authority* v. *Western N.Y. Water Co.*, 304 N.Y. 342, 349, *cert. denied*, 344 U.S. 892 (1952).

[13] EC 2-3 Whether a lawyer acts properly in volunteering advice to a layman to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laymen in recognizing legal problems. The advice is proper only if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. Hence, the advice is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause litigation to be brought merely to harass or injure another. Obviously, a lawyer should not contact a non-client, directly or indirectly, for the purpose of being retained to represent him for compensation.

EC 2-4 Since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result. A lawyer who volunteers advice that one should obtain the services of a lawyer generally should not himself accept employment, compensation, or other benefit in connection with the matter. However, it is not improper for a lawyer to volunteer such advice and render resulting legal

(footnote continued on following page)

following Disciplinary Rules have been formulated to regulate the conduct of attorneys:

> DR 2-103 Recommendation of Professional Employment
>
> * * *
>
> C. A lawyer should not request a person or organization to recommend employment, as a private practitioner, of himself, his partner, or associate, except that he may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists and may pay its fees incident thereto.
>
> D. A lawyer should not knowingly assist a person or organization that recommends . . . the use of his services or those of his partners or associates . . . .
>
> E. A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule.
>
> DR 2-104 Suggestion of Need of Legal Services
>
> A. A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take a

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services to close friends, relatives, former clients (in regard to matters germane to former employment) and regular clients.

EC 2-8 Selection of a lawyer by a layman often is the result of the advice and recommendation of third parties—relatives, friends, acquaintances, business associates, or other lawyers. A layman is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment. . . .

legal action shall not accept employment resulting from that advice, except that:

> 1. A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

Canon 9 states "A Lawyer Should Avoid Even the Appearance of Professional Impropriety". Among the specific ethical considerations relating to this canon is the following:

> EC 9-6 Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession . . . to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

See General Motors Corp. v. *City of New York,* 501 F.2d 639 (2d Cir. 1974). *See also Matter of Kelly,* 23 N.Y.2d 368, 375-76 (1968).

There have been many opinions of the ethics committees of the various bar associations dealing with the problem of solicitation.[14]

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[14] The opinion's are based upon the Code and upon the Canons of Professional Ethics, superceded by the Code on January 1, 1970. Canons 27 and 28 of the Canons of Professional Eethics provided:

> 27. ADVERTISING, DIRECT OR INDIRECT
>
> It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relationships. . . .

(footnote continued on following page)

In its opinion Number 8 (May 1913) the Committee on Professional Ethics of New York County Lawyers' Association roundly criticized the circulation by an attorney of a blank retainer letter: "This method of solicitation of employment by members of the Bar is unworthy, does not conform to ethical standards of our profession and should be condemned."[15]

In Formal Opinion 9 (April 29, 1926) the Committee on Professional Ethics of the American Bar Association disapproved a circular letter from attorneys which merely advised potential claimants of the existence of the Special Claims Convention between the United States and Mexico and the forthcoming regulations for filing claims. The circular contained no appeal or suggestion of employment, but was a statement of facts received from official sources. The committee found the circular improper: "The furnishing of such information by a lawyer to such persons, on his letterhead and over his signature, necessarily carries within the implication that the lawyer is familiar with the subject and would be glad to be employed in connection therewith."

In Formal Opinion 5 (July 7, 1924) the ABA Committee found it improper for an attorney to solicit employment

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28. Stirring up Litigation, Directly or Through Agents

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship, or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. . . . A duty to the public and to the profession devolves upon every member of the Bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof, to the end that the offender may be disbarred.

[15] Despite its failure to investigate the circumstances surrounding the Sulzberger-Rolfe solicitation letter, the District Court held that Opinion 8 is inapplicable here because "the retainer forms sent by Sulzberger-Rolfe, Inc. to potential plaintiffs were transmitted without the knowledge of the Berger or Wien firms" (366a).

from persons with whom he had no attorney-client relationship, even though the potential claimants might benefit financially from a test case being prosecuted by the attorney at the request of another client.

The New York State Bar Association Committee on Professional Ethics said in Opinion Number 338 (April 25, 1974):

> Thus a lawyer who properly volunteers advice to a layman that he should obtain counsel to take action may not, under DR 2-103 and DR 2-104(A) accept employment resulting from that advice, unless the situation falls within certain narrow exceptions set forth in DR 2-104(A) and EC 2-4, as where the lawyer's unsolicited advice is given to a 'close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client."[16]

In opinion Number 426 (December 1, 1937) the Committee on Professional Ethics of the Association of the Bar of the City of New York was requested to rule upon a pamphlet circulated by a client. The pamphlet described the work done by the attorney, lauded his abilities, and included a photograph and pertinent business information. In addition, it recited the details of presently pending litigation, the importance of the litigation and noted that further information could be obtained by contracting the attorney. The Committee answered:

> In the opinion of the Committee, it is not professionally proper for an attorney, under the circum-

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[16] As to whether someone is in fact a client the ABA Committee has said, in Informal Decision Number 809 (January 22, 1965), that "the word 'client' should be interpreted to mean a person or corporation who regularly employed the firm of attorneys. . . ." *Id.* at 5.

> stances described, even if the photograph were omitted, to permit the exploitation of himself for the sake of his client's cause, if that be the purpose of such pamphlet, and much less for the advertisement of himself, especially where such circularization is general.[17]

It is against this background of ethical principles that the facts presented to the District Court must be viewed and the adequacy of the District Court's response must be measured. We turn therefore to a discussion of (i) the facts apparent from the moving papers; (ii) the facts apparent from the opposing papers; and finally (iii) a discussion of the inadequate exploration of the facts at the March 5 hearing.

(i) Facts apparent from the moving papers

Mr. Wolfe of the Berger firm forecast on January 10, 1975 that there would be a substantial number of "additional plaintiffs", some of whom "may be cooperatives." Approximately six weeks later defendants presented to the Court the Sulzberger-Rolfe circular letter, dated February 6, 1975, with the appended undated, unaddressed fee and retainer agreement on the Berger firm letterhead and the Elliman & Co. circular letter.

The circular letters, which closely tracked the form letter sent out by Mr. Lippman, were obviously designed to provide maximum enticement to potential clients to join

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[17] *See also* Opinion Number 4 (March 1912) of the Committee on Professional Ethics of the New York County Lawyer's Association (it is improper practice for an attorney to procure clients through the systematic efforts of a client, at the instigation of the lawyer, by means of letters sent by the client to others in the same business urging employment of the attorney).

the pending litigation, and to suggest the folly of declining to do so:

> David Berger is described as a "highly qualified Philadelphia trial attorney" and a specialist in antitrust and securities litigation;
>
> Although it had not appeared for any plaintiff at the time, the firm of Wien, Lane & Malkin is prominently displayed and is described as "associate counsel"—the Wien firm is well known in local real estate circles;
>
> The requirements for retaining the Berger firm are set forth with great specificity, a one-third contingency on the recovery and a $1.00 per apartment advance by "intervening parties;"—nowhere are the recipients of the letters advised to contact their regular counsel and nowhere is there a reference to their obligation for costs;
>
> The lawsuit is described as not being a class action—so that failure to climb aboard will result in exclusion from "the recovery;"
>
> The Sulzberger-Rolfe letter says the complaint is for "millions of dollars"—thereby suggesting that the lawsuit is of such massive dimensions that "the recovery" will probably be large;
>
> The Sulzberger-Rolfe letter instructs that questions be referred to Mr. Lippman at Wien, Lane & Malkin—rather than to regular counsel;
>
> The Sulzberger-Rolfe letter erroneously says "many" cooperative buildings have "already agreed to join in"—suggesting that this is the only wise thing to do;

The Elliman & Co. circular letter reports that joining in the suit of "the Lefrak Organization" have been "Mr. Harry Helmsley . . . as well as many individual owners and cooperative corporations"—this representation was patently untrue since Mr. Helmsley did not even commence his separate action until a month after these events; it plainly offers the Helmsley "joinder" along with the reference to other owners and cooperatives as a basis for a decision by the recipients to do the same;

The Elliman & Co. circular letter falsely states that "it is believed the oil companies will probably prefer to settle" rather than litigate—suggesting the ease with which a pecuniary recovery might be had.

Communications intended merely to alert the cooperatives to a possible cause of action in their favor should have been neutral in tone with respect to the selection of counsel and description of the litigation. These circulars were quite the opposite. Each paragraph appeared to advise the cooperatives to join in the existing litigation being prosecuted by the Berger and Wien firms and to suggest that retainer of these counsel was the only prudent course of action.

It was thus obvious from even a cursory reading of the papers presented to the District Court on February 21, 1975 that an apparent solicitation of clients had occurred with the Berger and Wien firms as the intended beneficiaries. And it was equally obvious that widespread efforts to stir up litigation against the defendants were underway. Faced with these facts the District Court denied defendants' request for discovery.

(ii) Facts apparent from the opposing affidavits

On the return date the Berger and Wien firms served a memorandum and seven affidavits. In addition to omitting relevant facts, the affidavits raised a number of additional questions. A few examples will suffice. One omission concerns the letter of February 11, 1975 from Ralph W. Felsten to David Berger. This letter, referring to the Sulzberger-Rolfe circular, contains the question provoking statements:

> The retainer letter form distributed is the one we used prior to our recent decision to suggest the alternative, separate lawsuit. I doubt this will make for any difficulty. *We now are waiting for returns on this and at least two other groups of possible litigants.* We should have these results by February 21. (emphasis supplied)

Nowhere in any of the papers submitted by the Berger and Wien firms is there an attempt to explain the meaning of this highly significant letter.

Similarly, in his affidavit Mr. Lippman explained only in the most generalized terms the circumstances behind the circular letters sent out by Sulzberger-Rolfe and Elliman & Co. These circular letters closely tracked identical communications to these two firms admittedly sent by Mr. Lippman (164a-165a). Mr. Lippman made no mention in his affidavit of any other persons to whom he had sent his form letter or with whom he had discussed any of the circular letters. He neglected to note, for example, his letter to Brown Harris Stevens, Inc. Despite his later admission

that he also had communicated with Mr. Karelsen (281a), Mr. Lippman's affidavit ignored that subject as well.

Further, Mr. Lippman asserts that he had only general knowledge about the litigation and did not know Mr. Berger personally, yet he failed to explain how the form letter was drafted or who provided the information he set forth, which included a description of the action, an appraisal of Mr. Berger, and the nature of the Berger firm's practice, the detailed fee arrangements for intervening parties and the unfounded advice that the oil companies would prefer to settle the case rather than litigate the issues. Mr. Lippman failed to discuss Mr. Felsten's role, and Mr. Felsten did not submit an affidavit.

Mr. Lippman also acknowledged that he was aware before the Sulzberger-Rolfe circular was sent (164a) of Mr. Sulzberger's intention to communicate to property owners but failed to explain why he took no exception to that plan.

Nor did Mr. Lippman raise any objection to the use in the circulars of materials he had provided to Elliman & Co., despite his various admitted telephone conversations with Mr. Gumley of Elliman & Co. (165a).

Thus the affidavits and exhibits submitted by the Berger and Wien firms made clear that much more had transpired than had been disclosed so far and rather than putting the issues to rest the affidavits revealed additional areas of inquiry into which discovery was essential in order that the full facts come to light. Defendants once more requested leave to explore the facts through discovery, and again the application was denied. Instead the District Court convened a hearing which was restricted in scope, effectively preventing further development of the facts.

(iii) The March 5 hearing was an inadequate substitute for vigorous discovery

The District Court ruled at the outset of the hearing for the taking of testimony that it alone would pose the questions. The Court's questions were, for the most part, not framed to elicit information, but sought no more than bald conclusions of the witnesses. Many of the answers were plainly equivocal but no attempt was made to eliminate ambiguities.

Two colloquies illustrate the tenor of the Court's questioning. The following occurred during the interrogation of Mr. Wolfe:

> Q. The next question is, did you receive any communications as a result of this letter being sent to Mr. Sulzberger? A. To the best of my knowledge, no.
>
> Mr. MacCrate: Has there been any attempt, your Honor, to ascertain—
>
> Mr. Edelman: I object to that.
>
> The Court: I will not go into attempt. That is the inference part of it. We are not going on inference here, we are going on fact.
>
> You may step down. (297a)

Later, in questioning Mr. Felsten, who had written to Mr. Berger "We are waiting for returns on this and at least two other groups of possible litigants" (190a), the Court said:

> Q. I will ask the pointed question:
>
> Did you participate in the drafting of Mr. Lippman's letter to anyone of the individuals we spoke

about? A. No. Mr. Lippman did ask me questions about the background on the suit, which I gave to him. I did not see the letters, I did not participate in the drafting of them. I would like as a personal—I'd better not.

Q. I will ask you the question to make sure you don't get into the well, so to speak.

The next thing, as a result of a February 11th letter did anything occur or any action initiate by reason of that letter in someone being retained by you? A. No, my February 11th letter was a transmittal letter.

Q. And that's all it was? A. Yes, sir.

Q. And that was transmitted to whom? A. To Mr. Berger for his information. My foot was out the door as I wrote it.

Mr. MacCrate: Your Honor, I invite your attention to the statement in the letter, "We are now waiting for returns on this and at least two other groups of possible litigants. . . ." Then the further sentence, "We should have these results by February 21."

Q. Without mentioning— A. I am speaking of clients of mine who expressed interest—clients of Bill's, who expressed interest—therefore mine—and those are the ones I referred to.

The Court: All right. You may step down. You may take exception. (302a-303a)

In sum, the hearing left unanswered the questions which existed before it began. The Court accepted testimony that counsel had not authorized the campaign despite the fact

that on the very day William Lippman wrote to Sulzberger-Rolfe, Stanley Wolfe had announced in open court that there were going to be a substantial number of "additional plaintiffs" some of which would be cooperatives. In addition, the basic questions raised by Mr. Felsten's progress report to Mr. Berger were never asked.

C. In These Circumstances The District Court Abused Its Discretion By Restricting The Scope Of The Inquiry And Preventing Meaningful Examination Of The Facts.

It is against this background that the actions of the District Court must be reviewed for abuse of discretion. In brief summary, on February 21, 1975—six weeks after plaintiffs' counsel forecast joinder in these actions by co-operative apartment buildings—defendants placed before the District Court samples of circular letters, sent by real estate management concerns to cooperative apartment buildings, touting the Berger firm, misrepresenting the role of the Wien firm and inviting the addressees to join in the pending cases. Appended to one form of these circular letters was a fee and retainer agreement, in duplicate, on the Berger firm letterhead without a date and without an addressee. The District Court was also presented with Mr. Lippman's identical letters to three separate real estate concerns, much of the language of which was adopted wholesale in the circular letters subsequently sent to the cooperatives, and Mr. Felsten's letter of February 11, 1975 reporting the progress of the campaign to Mr. Berger.

The defendants' moved to disqualify plaintiffs' counsel premised upon the Court's duty to insure that counsel appearing before it conduct themselves in a professionally proper manner. The Court considered the motion, but refused to permit a full investigation of the facts despite a strong evidentiary showing.

The Court below gave no reasons for its refusal to permit counsel to pursue or to pursue itself a thorough investigation of the facts surrounding what appeared to be a wholesale solicitation campaign. The Court's only comment was that the proceeding was "judicial," not "adversary." Defendants are aware of no precedent which required the District Court to conclude that discovery was impermissible, that counsel should be barred from effective participation or that a hearing of this kind should be sharply abbreviated because it was thought to be a "judicial" inquiry.

To the contrary, under the Federal Rules of Civil Procedure discovery is the universal vehicle for ferreting out the truth. Similarly, vigorous examination and cross-examination by counsel are the traditional techniques used to present a case most effectively. No reason dictates that these procedures be unavailable in disqualification proceedings.

The District Court may have felt that the nature of a motion for disqualification compelled its conclusions. However, this finding is unsupported by authority. In disciplinary proceedings before grievance committees and the courts, the discovery and examination techniques rejected by the District Court are regularly employed in order to establish a thorough factual predicate for a thoughtful decision.[18]

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[18] *See generally* New York Appellate Division Rules, First Judicial Department § 603.12; New York Appellate Division Rules, Second Judicial Department § 691.12; New York Appellate Division Rules, Fourth Judicial Department § 1022.9; By-Law XIX of The Association of the Bar of the City of New York, 1973 Year Book of The Association of the Bar of the City of New York at 204-05.

In Problems and Recommendations in Disciplinary Enforcement, Final Draft, June, 1970, the ABA Special Committee on Evaluation of Disciplinary Enforcement said, at 86:

> Subpoena power is esential to the disciplinary process. Without it, the investigation of misconduct complaints is limited

(footnote continued on following page)

Moreover, while this Court has not ruled directly on the point, it has at least impliedly approved the use of depositions on a disqualification motion. In *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562, 574 at n. 9 (2d Cir. 1973) the court noted in passing that "Judge Motley considered extensive affidavits and *depositions* by the parties and reviewed them at length during an oral hearing on the motion" (emphasis supplied). *See Fisher Studio, Inc.* v. *Loew's Incorporated*, 232 F.2d 199 (2d Cir.), *cert. denied*, 352 U.S. 836 (1956) ("The facts upon which the disqualification was based were exhaustively developed in the proceedings before the Special Master. . . ."). *See also Evyan Perfumes, Inc.* v. *Hamilton*, 22 Misc. 2d 616 (Sup. Ct. 1959).[19] For purposes of deciding whether to permit discovery on a motion for disqualification, approval of depositions logically compels approval of requests for production of documents and examination and cross-examination by counsel.

To have fully developed the facts here would not have conflicted with the principles announced by this Court in cases concerning disqualification under Canon 4. In such situations secrecy of the former client's confidences is the

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to the evidence voluntarily produced. While it may be assumed that the complainant in most cases will cooperate in an investigation he has initiated, he often lacks precise information, much less proof, concerning the actual nature of the alleged misconduct. . . .

The accused attorney, on the other hand, while possessed of the relevant information, may be unwilling to cooperate.

[19] Thus "it is the duty of the District Court to examine the charge . . ." *Richardson* v. *Hamilton Int'l. Corp.*, 469 F.2d 1382, 1385 (3d Cir. 1972), *cert. denied*, 411 U.S. 986 (1973). *See Empire Linotype School, Inc.* v. *United States*, 143 F. Supp. 627 (S.D.N.Y. 1956). Further, "any doubt is to be resolved in favor of disqualification." *Hull* v. *Celanese Corp.*, No. 74-2126 at 2544 (2d Cir. March 26, 1975); *Fleischer* v. *A.A.P.*, Inc., 168 F. Supp. 548, 553 (S.D.N.Y. 1958), *appeal dismissed*, 264 F.2d 515 (2d Cir.), *cert. denied*, 359 U.S. 1002 (1959).

paramount consideration and so discovery is necessarily approached with restraint.[20]

A motion for disqualification based on a breach of Canon 2 however, invokes no special requirement for secrecy, for no legitimate client confidences are at stake. Solicitation of clients is not the type of activity undertaken in full public view so that the exposure of such conduct cannot be accomplished without substantial investigative effort.

Full investigation was clearly warranted by the facts presented by defendants' motion and, indeed, full investigation was essential for the District Court to fulfill its obligation to insure the integrity of the judicial process.

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[20] *Hull* v. *Celanese Corp.*, No. 74-2126 (2d Cir. March 26, 1975); *Emle Indus., Inc.* v. *Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973); *Laskey Bros., Inc.* v. *Warner Bros. Pictures, Inc.*, 224 F.2d 824 (2d Cir. 1955), *cert. denied*, 350 U.S. 932 (1956). *Accord, Chugach Elec. Assn.* v. *United States District Court for the District of Alaska*, 370 F.2d 441 (9th Cir. 1966), *cert. denied*, 389 U.S. 820 (1967).

CONCLUSION

If the ethical principles enunciated by this Court are to have vitality, then the procedure adopted by the District Court in this case must be corrected and the order denying disqualification vacated. The proceedings should be remanded with instructions for full and vigorous investigation of the underlying facts.

Respectfully submitted,

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June 9, 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- x

SAMUEL J. LEFRAK, et al., :

Plaintiffs-Appellees, :

-against- : Docket No. 75-7234

ARABIAN AMERICAN OIL COMPANY, et al., :

Defendants-Appellants :

- x

ROCHDALE VILLAGE, INC., :

Plaintiff-Appellee, :

-against- : Docket No. 75-7235

ARABIAN AMERICAN OIL COMPANY, et al., :

Defendants-Appellants. :

- x

NEW YORK CITY HOUSING AUTHORITY, :

Plaintiff-Appellee, :

-against- : Docket No. 75-7236

ARABIAN AMERICAN OIL COMPANY, et al., :

Defendants-Appellants :

- x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

DOROTHY M. SCHLIP, being duly sworn, deposes and

says that she is over the age of twenty-one years; that she is employed by the firm of Sullivan & Cromwell, attorneys for Defendant-Appellant Exxon Corporation; that on the 9th day of June, 1975 she served two copies of the brief of defendants-appellants and one copy of the joint appendix upon David Berger, P.A., attorney for all plaintiffs-appellees by

depositing true copies of the same securely enclosed in a postpaid wrapper in the Post Office Box regularly maintained by the United States Government at 48 Wall Street, Borough of Manhattan, City and State of New York, directed to said David Berger at 1622 Locust Street, Philadelphia, Pa. 19103.

Dorothy M. Schlip

Sworn to before me this
9th day of June, 1975

George A. Scholze
Notary Public

GEORGE A. SCHOLZE
Notary Public, State of New York
Residing in Nassau County
Nassau Co. Clk's No. 30-3526250
Certificate Filed in
New York Co. Clk's Office
Commission Expires March 30, 1977

Service of two (2) copies of the within brief is hereby admitted this 9th day of June, 1975.

Harriet Taran

Attorney for Plaintiffs-appellees, Lefrak & Rochdale

Attorney for Plaintiff-appellee N.Y. City Housing

Attorneys for Plaintiff-appellees

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